

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESale PRICE
LITIGATION

)
) MDL No. 1456
) Master File No. 1:01-CV-12257-PBS
) Sub-Category Case No. 1:08-CV-11200
)

THIS DOCUMENT RELATES TO:
*United States ex rel. Linnette Sun and Greg
Hamilton, Relators*
v.
Baxter Healthcare Corporation

) Judge Patti B. Saris
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**NOTICE OF CLARIFICATION REGARDING
MOTION FOR LEAVE TO FILE UNDER SEAL**

Pursuant to the Court's April 25, 2012 Order regarding Notice, Baxter filed under seal the Declaration of Merle M. DeLancey Jr. (Exhibit 1 to the Declaration of Shamir Patel in Support of Baxter's Response to the Court's April 25, 2012 Order Regarding Notice) [Sun Dkt. No. 180-1]. The DeLancey Declaration contains confidential settlement information related to the mediation discussions between Baxter and Ven-A-Care, supervised by Court-appointed mediator Professor Eric Green and his company, Resolutions, LLC. Baxter now clarifies its request that certain confidential information stated in the DeLancey Declaration also be withheld from relators' counsel in the Sun/Hamilton case, who were not parties to the Baxter/Ven-A-Care mediation. In addition, attached as Exhibit 1 to this filing is a public redacted version of the DeLancey Declaration, which redacts only paragraphs 5 (partial), 7, and 8 related to confidential settlement information.

The Confidentiality provision in the Resolutions, LLC Mediation Agreement, agreed to by counsel for Baxter and Ven-A-Care, states that

This entire process is a compromise negotiation. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the Parties, their agents, employees, experts and attorneys, and by RESOLUTIONS, LLC employees, who are the Parties' joint agents and Mediator(s) for purposes of these compromise negotiations, are confidential. Such offers, promises, conduct, and statements will not be disclosed to third parties and are privileged and inadmissible for any purpose, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions, including but not limited to the Massachusetts mediation privilege statute, G.L. c. 233, § 23C. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its use in the mediation.

Counsel for Sun/Hamilton were not parties to this agreement.

Baxter raised concerns with the Court at the April 25, 2012 hearing that Baxter counsel's declaration regarding notice may implicate both Rule 408 of the Federal Rules of Evidence and the separate confidentiality agreement with Prof. Green. Tr. at 37. The Court responded that "If one needs to, one could file it under seal." As the Court can determine, *in camera*, the redacted paragraphs 5 (partial), 7, and 8 in the DeLancey Declaration clearly fall under this confidentiality provision and, separately, under Rule 408 of the Federal Rules of Evidence, and therefore should be kept confidential from the Sun/Hamilton relators, as well as the public.

WHEREFORE, Defendants respectfully request that this Court grant leave to file the Declaration of Merle M. DeLancey Jr. (Exhibit 1 to the Declaration of Shamir Patel in Support of Baxter's Response to the Court's April 25, 2012 Order Regarding Notice) under seal.

Dated: May 3, 2012

/s/ Shamir Patel

Shamir Patel

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CERTIFICATE OF SERVICE

I hereby certify that I, Shamir Patel, an attorney, electronically filed the foregoing document with the Clerk of the Court for the District of Massachusetts using the Court's CM/ECF system on May 3, 2012. I also caused a true and correct copy of the foregoing document to be delivered to all counsel of record by electronic service via LexisNexis File & Serve, for posting and notification to all parties.

/s/ Shamir Patel

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